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No. 58336-1-I

IN THE COURT OF APPEALS DIVISION ONE
OF THE STATE OF WASHINGTON

CITY OF SEATTLE,

Plaintiff/Appellant,

v.

JESUS QUEZADA,

Defendant/Respondent.

THE CITY'S RESPONSE TO AMICUS W.A.C.D.L. BRIEF

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A. ARGUMENT IN REPLY.

The Washington Association of Criminal Defense Lawyers ("WACDL") reargues several points in favor of Quezada's interpretation of RCW 46.61.5055, the DUI sentencing statute.

1. Dicta, misquotations, and inapplicable definitions fail to support WACDL's legal analysis or their conclusion.

WACDL repeatedly relies upon dicta throughout their brief for authority. For instance, they quote *State v. Holmgren*[1], stating, "RCW 46.61.5055...limits prior offenses to those within the last seven years for purposes of punishing a DUI offense." If that simple analysis were applied in our case, the City should prevail because all Quezada's prior offenses were "within the last seven years" and he should have been sentenced as a person with two or more prior offenses. But WACDL's quotation of *Holmgren* is incomplete. Instead, it goes on to state "..., that limitation is irrelevant to the punishment of Holmgren for vehicular homicide." *Holmgren* was not attempting to decipher the definition of "within seven years" because it did not apply in that case. Because

[1] *State v. Holmgren*, 106 Wn. App. 477, 482, 23 P.3d 1132 (2001).

Holmgren does not address our issue, it provides no supporting authority in our debate.

WACDL quotes similar dicta from *City of Yakima v. Skov*.[2] Once again they rely upon a case in which neither party debated whether the defendant's Deferred Prosecution was properly a "prior offense" or if it was "within seven years". Instead, Skov alleged that enhancing his sentence for DUI based upon a dismissed Deferred Prosecution was a violation of due process. In other words, Skov *agreed* the enhancement was applied consistent with the statute, but challenged the constitutionality of the statute. As with *Holmgren*, if the *Skov* interpretation were applied herein, all Quezada's prior offenses would fall "within the previous seven years" before the DUI sentencing in our case and Quezada should be resentenced. As with *Hahn*, we distinguish *Skov* even when it supports our interpretation because *Skov* simply is not authoritative upon the issue before this court.

Similarly unhelpful is WACDL's citation to *Kent v. Jenkins*.[3] That court granted review to address whether a

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[2] *City of Yakima v. Skov*, 129 Wn. App. 91, 93, 118 P.3d 366 (2005).
[3] *Kent v. Jenkins*, 99 Wn. App. 287, 291, 992 P.2d 1045 (2000).

previously dismissed Deferred Prosecution is a "prior offense".[4] That court's plain reading of RCW 46.61.5055(8)(a)(vii) concluded, "it is the 'granting' of the prior deferred prosecution that triggers its treatment as a prior offense in subsequent DUI offenses."[5] Thus the case supports the view that Quezada's prior grant of a DP is a "prior offense". But *Jenkins* does not address whether a "subsequent DUI offense" means the *arrest* must occur subsequently, or whether the *conviction* need occur subsequently. Because *Jenkins* does not address the specific question raised herein, it provides no guidance on our issue.

WACDL then proceeds from citing dicta to fabricating it. WACDL's quotation of *Bremerton v. Tucker*[6] recites:

> where a "prior offense" occurred "within the previous seven years of a new DUI...the penalty for the new DUI [will] be more severe than it would have been had the new DUI been [the] first offense."[7]

No such quotation is found in *Bremerton v. Tucker*. Instead, WACDL simply rewrote this original sentence:

> Our legislature has mandated that if a person convicted of DUI has had a "prior offense" within the previous

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[4] *Id.*, at 289.
[5] *Id.*, at 291.
[6] *Bremerton v. Tucker*, 126 Wn. App. 26, 30-33, 103 P.3d 1285 (2005).
[7] WACDL brief at 4 (emphasis and quotes in WACDL brief).

> seven years, the trial court must impose a higher minimum sentence for a new DUI conviction than it would impose for a person with no prior DUI offenses.[8]

By adding and subtracting words, WACDL attempts to create supportive legal precedent for a sentencing scheme based upon the arrest date. But the actual quote from *Bremerton* plainly concludes that the legislature intends to punish new DUI *convictions* with a more harsh penalty—not new DUI arrests. *Bremerton* does not suggest sentencing courts must exclude DUI convictions because they are *too* recent.

WACDL also includes a second alleged quote from *Bremerton*.[9] No such quote is found. Neither *Bremerton*, nor WACDL's citations to dicta in *Walla Walla v. Greene*[10] or *City of Richland v. Michel*[11] support their argument.

WACDL then attempts this combine this dicta to a "plain and ordinary" interpretation of the legislatively defined term "prior offenses". But WACDL cannot rely upon the dictionary to provide a definition for a term the legislature already defined. Our courts repeatedly hold that where a term is defined the court will use the

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[8] *Id.*, at 30.
[9] WACDL brief at 4.
[10] *Walla Walla v. Greene*, 154 Wn.2d 722, 116 P.3d 1008 (2005).

legislative definition, and only where a term is undefined will it be given its plain and ordinary meaning.[12] Accordingly, WACDL may not ignore the legislative definition of "prior offenses" in favor of his "plain and ordinary" dictionary meaning of that term. The legislative definition of "prior offenses" requires only that an offense be one of certain listed acts.[13] The term does not include any requirement that one offense arise before any other, only that they fit the classification by being completed acts of "conviction" or "grant of a DP".

Stripped of unsupportive dicta, misquotations, and an inapplicable definition, WACDL's legal analysis collapses. No authority supports WACDL's conclusion that DUI offenses must be sentenced in the order in which they are committed in order to implement the legislature's intent to punish prior DUI *convictions* or grants of a DP during DUI sentencing. A DUI conviction, the grant of a DP for DUI, and a conviction for DUI amended to Reckless Driving are all "prior offenses". Because each of these "prior offenses" arose within seven years of the arrest date for the

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[11] *City of Richland v. Michel*, 89 Wn. App. 764, 950 P.2d 10 (1998).
[12] *U.S. v. Hoffman*, 154 Wn.2d 730, 116 P.3d 999 (2005).

current sentencing, they are also all "within seven years" and Quezada should have been sentenced as a person with "two or more prior offenses".

2. WACDL's various comments upon the SRA and DUI statistics provide no support for their sentencing scheme.

WACDL also complains references to the SRA are not very useful and then spends an unfortunate number of pages thrashing about with DUI statistics. For clarity, we address these issues.

WACDL accuses the City of attempting to overcome their legal analysis by inappropriately referencing the SRA.[14] Since it was Quezada who first cites the SRA for authority, WACDL's accusation is misguided.[15] The City merely responded to Quezada's errant reasoning, noting that the sentencing scheme of the SRA is wholly consistent with the City's interpretation of the DUI sentencing statute.[16] Nor do we agree that any reference to the SRA is inappropriate. Interpreting the DUI sentencing statute

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[13] *City of Walla Walla v. Greene*, 154 Wn.2d 722, 727, 116 P.3d 1008 (2005).
[14] WACDL Reply Brief at 11.
[15] See RBR at 11.
[16] City's Response Brief at 3.

requires context.[17] The general sentencing procedures of the SRA provides some context for sentencing in Washington. The fact the general procedures of the SRA support the City's interpretation of the DUI sentencing statute and conflicts with WACDL's is relevant because the legislature is presumed to be fully aware of existing statutes.[18]

The City's opening brief also notes that DUI sentencing based upon Quezada's favored arrest-date-sentencing is only tempting if we accept Quezada's hidden assumption—that equity is served because the defendant will obtain precisely the same punishment under either sentencing scheme.[19] But that assumption is not correct. Under Quezada's sentencing scheme, his punishment is dramatically altered by how he decides to arrange his DUI dispositions. The legislature did not intend that disposition by Deferred Prosecution be subject to manipulation.[20] Similarly, for at least the last two decades, our legislature has stated "[T]he legislature seeks to ensure swift and certain consequences for those

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[17] *Houser v. State*, 85 Wn.2d 803, 540 P.2d 412 (1975)(In interpreting laws, the court cannot operate in a vacuum).
[18] *State v. Thornbury*, 190 Wash. 549, 69 P.2d 815 (1937).
[19] Quezada argued he was already punished as a "second" offender during his prior sentencing for Reckless Driving.

who drink and drive."[21] Adopting WACDL's interpretation of the DUI sentencing statute rewards delay and introduces uncertainty into DUI sentencing, contrary to the express intention of the legislature.

WACDL's arguments upon DUI statistics stray widely from the issue raised by Quezada in his opening brief and to which the City replied. Quezada posed a hypothetical with a DP revoked by a later DUI, arguing the City's interpretation results in treating both offenses as a "second offense." Quezada argued the statute should be construed so that the later DUI is punished as the "second" and the earlier DUI is punished as the "first", even though the earlier DUI is sentenced last.

But Quezada buried an incorrect assumption in his logic. Once a DP is granted, it is a "prior offense" under the statute and must be considered in any future DUI sentencing.[22] Under Quezada's hypothetical, a person is granted a DP for a DUI, is convicted of a later DUI, then has their DP revoked and is again convicted of DUI. Under the City's interpretation of the statute the

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[20] *State v. Bays*, 90 Wn. App. 731, 736, 954 P.2d 301 (1998).
[21] Laws of 2004 Ch. 68 §2; Laws of 1983 Ch. 165 §44.
[22] *Jenkins* at 289.

defendant is not sentenced "twice" at any point. Under the statute, the first DUI sentencing would include an enhancement for the prior grant of the DP for DUI. So the first conviction results in an enhanced sentence for "one prior offense". At the second DUI sentencing, the court would include the prior grant of the DP *and* the prior conviction for DUI. Thus, the second DUI conviction results in an enhanced sentence for the "two prior offenses". This interpretation is supported by RCW 46.20.355, implementing the license suspensions required by RCW 46.61.5055, and requiring suspension after grant of a DP *and* every conviction for DUI. By following the simple dictates of the DUI sentencing statute, we avoid Quezada's "unfairness" by anomaly.

In our Reply to Quezada's philosophy of "ultimate fairness" by arrest date sentencing, we specifically questioned how it applies to other circumstances. We noted that most DUI arrests do not result in a conviction for DUI, relying upon statewide statistics. This is important because, without an admission or conviction, enhanced punishment at a later DUI sentencing is impossible.[23] Quezada's scheme cannot survive constitutional

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[23] *City of Walla Walla v. Greene*, 154 Wn.2d at 727.

challenge if it rests merely upon sentencing based upon the order of his arrests. Instead, Quezada must be proposing to *add* a limitation not found in the legislative definition of "prior offense", contrary to many prior decisions of our courts.[24] Nor, as we demonstrate below, does Quezada's proposal increase fairness.

Examining the common circumstance where a defendant is arrested for DUI on two separate occasions and both matters are pending illustrates our point. If a plea is entered to the second charge of DUI, the defendant cannot be punished more harshly for merely having a prior pending DUI charge. Without a prior conviction, the second offense DUI plea must result in a "first offense" mandatory sentence. But having pled guilty to the second DUI a later plea to the "first" DUI would also, under Quezada's scheme, result in a "first offense" sentence. Applying Quezada's sentencing scheme does not demonstrate more "fairness". Rather, it demonstrates a sentencing scheme that favors the DUI defendant. Unlike Quezada's arrest-date scheme, the City's interpretation of the DUI statute assures equitable sentencing in both the DP circumstance *and* the remaining majority of cases. WACDL's

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[24] *State v. Christensen*, 153 Wn.2d 186, 102 P.3d 789 (2004)(the court

discussion of DUI statistics does nothing to support Quezada's argument or undermine the City's analysis.

Upon nothing more than their own claim, WACDL insists "game playing" will not arise under their interpretation of the DUI sentencing statute. The assertion is plainly at odds with the role of the defense attorney—to advocate vigorously on behalf of the defendant. WACDL's claim is also at odds with cases demonstrating obvious defense attempts to manipulate DUI sentencing. In *State v. Hahn*, 83 Wn. App. 825, 924 P.2d 392 (1996), two separate defendants entered into Deferred Prosecutions under RCW 10.05 for DUI. Within months, both defendants were arrested for new DUI offenses. Both defendants voluntarily withdrew the Deferred Prosecutions already granted in their initial DUI and entered new petitions upon the later DUI. This game-playing attempted to avoid the more harsh penalties for the later arrest by moving the DP from the first offense DUI to nullify the more harsh punishment for the second offense DUI. The *Hahn* court reversed the trial court's grant of the second DP in both cases, concluding the grant of the DP in the first DUI offense

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must not add words to statute where legislature has chosen not to).

exhausted their DP opportunity.

Similarly, in *State v. Gettman*, 56 Wn. App. 51, 782 P.2d 216 (1989), the defendant was charged with DUI. Three months later, the defendant was charged in another DUI. The trial court granted the defendant's motion to consolidate both DUI offenses into a single DP petition. The *Gettman* court reversed, concluding DUI offenses more than seven days apart may not be consolidated. Like *Hahn*, this game-playing was motivated by an attempt to avoid punishment.

Unlike either *Hahn* or *Gettman*, where the trial court could have prevented game-playing strategies, WACDL proposes a system where the defendant possess the sole ability to manipulate mandatory sentencing. WACDL's claim that defense attorney's will not attempt to take advantage of the obvious loop-holes their sentencing scheme creates is, at best, naïve. In contrast, requiring that "prior offenses" meet the express requirements of the statutory definitions without creating exclusions reduces such game-playing and conforms with the legislative intent to implement "swift and certain" consequences for DUI convictions.

WACDL also argues that even if their proposed sentencing

scheme results in game-playing and inequitable sentencing, the trial courts have the ability to remedy the inequity by exercising their discretionary sentencing authority.[25] By this argument WACDL appears to miss the whole point of mandatory sentencing. If the legislature believed discretionary sentencing were sufficient to achieve their policy goals, mandatory sentencing would not exist. The point of mandatory minimum sentencing is to force trial courts to impose minimum sentences, eliminating discretion upon this point. Relying upon discretionary sentencing to repair WACDL's mandatory sentencing scheme simply eliminates mandatory sentencing. WACDL's DUI sentencing scheme is not only unsupported by law and unsupported by equity, it contradicts and undermines the stated goals of the legislature for DUI mandatory sentencing.

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[25] WACDL Brief at 16-17.

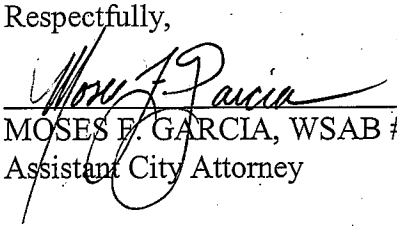
B. CONCLUSION

This court should remand for resentencing under RCW 46.61.5055(3) governing sentencing for DUI convicts with two or more prior offenses and consistent with the Order of the Superior Court reversing the trial court's grant of EHM in lieu of mandatory jail.

DATED THIS 19th day of April , 2007.

SEATTLE CITY ATTORNEY'S OFFICE
THOMAS A. CARR, CITY ATTORNEY

Respectfully,



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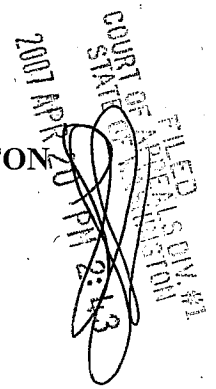

IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON
DIVISION ONE

CITY OF SEATTLE,	
Plaintiff/Appellant,	**Ct. of Appeals No. 58336-1-I**
vs.	**CERTIFICATE OF SERVICE BY U.S. MAIL**
JESUS QUEZADA,	
Plaintiff/Respondent.	

The undersigned certifies under penalty of perjury under the laws of Washington the following:

I am a citizen of the United States of America, over age eighteen years and competent to be a witness herein.

That on the 19th day of April, 2007, I forwarded by U.S. Mail, postage prepaid, a true and correct copy of the attached *The City's Response To WACDL Brief* directed to:

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